No. 12678

United States Court of Appeals

For the Ninth Circuit.

FEDERAL SERVICES FINANCE CORPORATION, a Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII, AT HONOLULU, a Corporation,

Appellee.

Appeal from the United States District Court, For the Territory of Hawaii

BRIEF FOR APPELLANT FEDERAL SERVICES FINANCE CORPORATION

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BRIEF FOR APPELLANT

JURISDICTION

Pursuant to Title 28, U.S.C. sec. 1332 (a) (1) and (b), there was presented to the District Court in Hawaii a suit by appellant, a Delaware corporation, against appellee, a national banking association located in the Territory of Hawaii, involving a matter in controversy exceeding $3,000.00, exclusive of interest and costs. These facts are pleaded in the amended complaint, paragraph I (R. 14). These jurisdictional facts were admitted in appellee's answer, paragraph I in its Second Defense (R. 6), and by oral stipulation of counsel for appellee (R. 39).

Judgment in favor of appellee was entered April 10, 1950 (R. 26). Appellant, pursuant to Rule 59 of Title 28, U.S.C., Federal Rules of Civil Procedure for District Courts, filed a motion for a new trial on April 19, 1950

(Sup. R. 209-210). Said motion was denied on May 19, 1950 (Sup. R. 210). Pursuant to Title 28, U.S.C., sec. 1291 and sec. 1294 (1), appellant noted and perfected its appeal to this Court (R. 27). This appeal was filed on June 16, 1950, which was within thirty days, as required by Rule 73 (a) of said Federal Rules of Civil Procedure.

STATEMENT OF FACTS

This case is a suit by appellant, a depositor, against appellee, the drawee-bank, seeking to recover $17,726.00, representing the total of the sums paid out by appellee bank and charged to appellant's account on twelve (12) checks drawn by appellant during January through May, 1949. Appellant's contention is that each of the twelve checks was not paid according to its terms, to-wit: to the named corporate payee, or its order.

At the trial the following evidence was adduced:

A. THE EVIDENCE (ALL UNDISPUTED) CONCERNING THE CHECK CASHING.

Appellant was a depositor in the appellee bank, having at all pertinent times sufficient funds on deposit in appellee bank to cover all checks drawn by appellant on appellee bank, including the twelve checks now the subject of this case (R. 40).

During the months of January, 1949, through May, 1949, the twelve checks in question were drawn by appellant, each one being made payable to the order of Waipahu Auto Exchange, Ltd. (R. 53-64, plaintiff's Exhibits B-1 to B-12, inclusive), a corporation organized under the laws of the Territory of Hawaii (R. 6, 9, 40).[1]

[1] Fourteen (14) checks in all were drawn payable to Waipahu Auto Exchange, Ltd., during this period (R. 51). The two checks not here concerned are dated February 2, 1949, and May 9, 1949. The February 2nd check was endorsed "For deposit, Waipahu Auto Exchange, Ltd., By F. H. Shintaku," and paid to the Bank of Hawaii, Waipahu Branch (R. 68, admitted in Evid. R. 67). The May 9th check was cashed in the office of the appellant cor-

Each of the twelve checks was endorsed substantially "Waipahu Auto Exchange, Ltd., By Anthony Yee, President" (R. 53-64, admitted, R. 51).[2]

The clear inference to be drawn from an examination of each check (R. 53-64), coupled with the appellee's answer (R. 6-9) and oral admissions (R. 42), is that in each instance Anthony Yee was paid cash on presentation of the checks, and the trial court so found (R. 20-21). Nine of the checks were cashed by Anthony Yee at the appellee bank, the other three were cashed at the Bank of Hawaii, which bank endorsed these checks to the appellee, appellee, in turn, cancelling them and charging the amounts thereof against the account of the appellant. Although Anthony Yee was then President of Waipahu Auto Exchange, Limited (R. 96), there is no evidence in the record that he was expressly authorized to cash corporate checks or that the cash received was ever paid to the corporation.

When bank statements by the appellee bank were submitted to the appellant monthly, they were examined for the purposes of reconciling the bank account. It was not the custom, prior to the "Yee incident" for the appellant corporation in examining the bank statements to do more than reconcile the bank account by comparing its record of the amounts of the checks drawn against the amounts shown in the bank statement. Prior to the "Yee incident" the endorsements were not examined (R. 78-80).

Prior to the commencement of this suit, appellant tendered to appellee each of the twelve checks and demanded repayment of the total sum of $17,726.00 (R. 43). Demand was refused (R. 44), and this suit instituted.

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poration by one of the corporation's employees and the money paid to Anthony Yee, President of Waipahu Auto Exchange, Ltd., following which the check was deposited to appellant's account (R. 69-78, 83).

[2] One endorsement omitted the word "Ltd.," and one endorsement omitted the word "By." Four of the checks spelled out the word "Exchange," and eight others abbreviated it "Ex" (R. 53-64).

B. ADOPTION OF THE BY-LAWS AND THE INCORPORATION OF WAIPAHU AUTO EXCHANGE, LIMITED, THE NAMED PAYEE.

Herbert K. H. Lee, a Honolulu attorney, was consulted by Anthony Yee (characterized by Mr. Lee as the "prime mover in this organization") about organizing a corporation called the "Waipahu Auto Exchange" (R. 109). The record discloses only four initial incorporators and stockholders: Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang and Takeshi Yokono (R. 90, 122, 107). Mr. Lee drew up the Articles of Incorporation and the By-Laws (R. 109), but overlooking the fact that Hawaii statutory laws require five incorporators, he prepared spaces for only the four signatures on each document (R. 110, 111). In order to save the incorporators a trip to Honolulu, the documents were turned over to Anthony Yee to have executed at the shop office located at Waipahu, a distance of about twenty miles from attorney Lee's office (R. 109, 132-133). On November 13, 1948 (R. 87), Anthony Yee called a meeting of the four stockholders-incorporators at the shop office, these four being the same four listed earlier: himself, Fred Shintaku, Kay Pang and Takeshi Yokono (R. 89). Yee produced the By-Laws and Articles of Incorporation which were read through; several points were discussed and the papers were signed. No minutes were taken at the meeting (R. 86-90).

The By-Laws and Articles of Incorporation were returned to lawyer Lee, signed by the four initial stockholders and the original four incorporators. The Articles were filed with the Territorial Treasurer's Office on November 27, 1948 (R. 109-110, 103) (By-Laws do not need to be filed under Territorial law). However, because the Articles contained the signatures of only four incorporators, they were returned to attorney Lee's office (R. 111). So lawyer Lee was asked to be a dummy director and dummy

incorporator to comply with the statute requiring five incorporators (R. 111). Lee added his name to the list of directors and incorporators (R. 104-105) and the Articles were refiled on December 7, 1948 (R. 103). Lawyer Lee was not a stockholder (R. 127), and throughout the life of the corporation did not attend directors or stockholders meetings (R. 131).

Although lawyer Lee did not sign the purported By-Laws, he testified that during this procedure of incorporation, prior to the filing of the Articles of Incorporation, he drew up the By-Laws and by implication approved them (R. 111). He identified the executed By-Laws (R. 111-123) as being the original, and stated that it had been kept in his files as the functional By-Laws at all times until asked for by appellant's attorney (R. 122, 127).

Takeshi Yokono testified that the document contained the By-Laws under which the corporation acted (R. 88).

Despite the foregoing evidence, the By-Laws were not admitted in evidence, the Court ruling "In the absence of any meeting of stockholders or directors with relation to these purported By-Laws, the offer is denied at the present time" (R. 136).

C. THE TESTIMONY OF TAKESHI YOKONO.

Appellant called the witness Takeshi Yokono and only questioned him on the limited issue of the execution and authenticity of the purported By-Laws of Waipahu Auto Exchange (R. 85-88). Although the cited pages contain the sole testimony adduced from this witness by appellant, over objection by appellant the trial court allowed the cross-examination to continue over wide fields for 55 pages, not including exhibits (also admitted into evidence over objection) (R. 94-101, 136-165, 172-175, 177-189). During this cross-examination the following developed:

The witness Yokono was treasurer of Waipahu Auto Exchange (R. 96), but he never drew any salary since he

had a full-time job running a general store (R. 139-140). He would put in a limited amount of time from day to day as it was needed (R. 140). As a part of his duties as treasurer he would attend to the making of deposits in the bank for Waipahu Auto Exchange (R. 145).

Shintaku was the general manager (R. 97), and vice president of the corporation (R. 105), was a full-time employee, and was in charge of the Waipahu Auto Exchange office (although the dates during which he was a full-time employee are not shown (R. 141)).

Anthony Yee was the president until about June or July, 1949, of Waipahu Auto Exchange (R. 94, 148-149), but he did not act as general manager (R. 97). He was the presiding officer and presided over the November 23rd meeting (at which the By-Laws and Articles of Incorporation were executed), held at the shop office, and over all directors meetings (R. 98). Yee dealt with finance companies with Yokono's sanction (R. 97, 161). There is no record of any resolution relating to dealings with the appellant corporation. Yokono depended upon Yee for the making of arrangements and the carrying out of arrangements that existed with respect to the assignment of conditional sales contracts to the appellant finance company, and Yokono had no personal knowledge thereof except what he had understood from Yee (R. 98-100).

The secretary was Kay Y. K. Pang, a relative of Yee, but she was an inactive secretary and did not know what the corporation was doing. She did not sign any papers as secretary, nor did she keep any records of meetings or of any corporate transactions. She was not able to do the work as secretary, and she asked the others to do her work for her (R. 105, 141-142).

Regarding the keeping of the books, Yokono kept what he characterized as the "datas," but the corporation journal and ledger were not written out until June or July, 1949 (after the Yee defalcation was discovered) (R. 148).

It is to be noted that the corporation maintained an account in the Bank of Hawaii, Waipahu Branch, and all of the checks drawn by the corporation on that account were signed "Waipahu Auto Exchange, Limited, by T. Yokono, Treasurer," and countersigned "F. H. Shintaku, Vice President" (R. 29-30).

QUESTIONS INVOLVED

1. Did Anthony Yee, president of Waipahu Auto Exchange, Limited, possess authority, inherent, implied or apparent, to endorse and cash twelve checks made payable to the corporation?

2. Did the trial court err in excluding from evidence the purported By-Laws of the Waipahu Auto Exchange, Limited, the corporate payee named in the twelve checks?

3. Did the trial court err in allowing a general cross-examination of the witness Takeshi Yokono, examined on direct on the limited issues of the execution and authenticity of the By-Laws of Waipahu Auto Exchange, Limited?

SPECIFICATION OF ERRORS

The District Court in Hawaii is in error in this case in that:

1. The Court erred in denying the offer in evidence by appellant of the By-Laws of the Waipahu Auto Exchange, Limited, being Plaintiff's Exhibit No. 1 for Identification, relevant portions of which are printed in the Record (R. 111-122). Pertinent parts of the By-Laws are quoted as follows:

Article IV, Section 3 (R. 116):

> "Section 3. The President. The President shall preside at all meetings of stockholders; and in case no Chairman of the Board of Directors is appointed, or in the absence of such a Chairman, if appointed, he shall preside at meetings of the Board of Directors.

He shall exercise general supervision over the business of the corporation and over its several officers, agents and employees, subject, however, to the control of the Board of Directors."

Article IV, Section 5 (R. 117):

"Section 5. The Treasurer. The Treasurer shall have custody of all the funds, notes, bonds and other evidences of property of the corporation, and shall be responsible for keeping all the books and accounts of the corporation, and shall render statements thereof in such form and as often as required by the Board of Directors. He shall be responsible for the keeping of the stock books, stock transfer books, and stock ledger of the corporation. The Treasurer shall perform all other duties assigned to him by the President or the Board of Directors."

Article V (R. 118):

"Article V.

Execution of Instruments

Section 1. Proper Officers. Except as otherwise provided by these by-laws or by law, all checks, drafts, notes, bonds, acceptances, deeds, leases, contracts, and all other documents and instruments, shall be signed, executed and delivered by the President or a Vice-President and by the Treasurer or the Secretary; provided, however, that the Board of Directors may from time to time by resolution authorize checks, drafts, bills of exchange, notes, orders for the payment of money, licenses, endorsements, stock powers, powers of attorney; proxies, waivers, consents, returns, reports, applications, notices, agreements or documents, instruments or writings of any nature to be signed, executed and delivered by such officers, agents or employees of the corporation, or any one of them, in such manner as may be determined by the Board of Directors."

The foundation for the offer of the Exhibit was made by the testimony of Mr. Herbert K. H. Lee (R. pp. 101-102, 108-127), plaintiff's Exhibit C, being a certified copy of the Articles of Incorporation of Waipahu Auto Exchange, Limited, excerpts of which are in the Record (pp. 102-108), and the testimony of Takeshi Yokono (R. 86-91). The By-Laws were offered in evidence by plaintiff in the following words:

> "If your Honor please, I make a second offer of proof of Plaintiff's Exhibit 1, for identification and ask that these be received in evidence, based upon a foundation's having been laid in the testimony of Mr. Lee and Mr. Yokono" (R. 127).

The offer in evidence was objected to by appellee in the following language:

> "I object to the admissibility of these as the proposed by-laws of the corporation on the grounds that there has been no compliance shown with the statutes of the Territory, without admitting that even if they were by-laws that it would have any bearing on the authority which will ultimately be decided. I think that the admissibility of these records would merely further clutter up the confusion as to who had authority to act" (R. 131-132).

Additional evidence was adduced through Mr. Lee prior to the trial court's ruling (R. 127-133). Appellant stated its grounds for urging the admissibility of the By-Laws (R. 133-134, and again 135). Appellee restated its objection (R. 134-135):

> "In order that our objection may be complete on the record, we object to the admissibility of these by-laws, first, because it affirmatively appears that they were not adopted by the corporation in accordance with the provisions of law and in fact are not by-laws; secondly, and equally important, because there has been no showing made — The statute providing that

there is no constructive notice of the by-laws on outsiders, there is no showing made that we had or could have obtained actual notice of the by-laws; next, on the ground that it appears from the evidence that has been adduced so far that even the statutory requirement of having a certified copy available, certified by the secretary and available for examination by the stockholders, which appears in this same section, was not complied with; next, on the ground that the only testimony that they acted as though these were the by-laws is a statement by the attorney that he assumed they were the by-laws because he had them in the file all during the existence of the corporation.

"Since the movant has the affirmative burden of showing that this document either is the by-laws effective or that we had notice that they were by-laws and that there were limitations brought home to us, the document is not admissible. For all these grounds we urge your Honor not to admit the document in evidence."

The court ruled (R. 136):

"In the absence of any meetings of either stockholders or directors with relation to these purported by-laws the offer is denied at the present time.

"Mr. Saunders: If your Honor please, if I may call your attention to the testimony of Mr. Yokono yesterday, he said they had a meeting and all four of them read the articles and by-laws at that time and signed them. He further stated that these were the by-laws under which the corporation acted. With that in mind, I ask your Honor to reconsider your ruling.

"The Court: No, the ruling stands."

2. The Court erred in allowing counsel for defendant-appellee, over objection of counsel for plaintiff-appellant, to cross-examine the witness Yokono concerning the authority of Anthony Yee in regard to the management of the affairs of Waipahu Auto Exchange, Limited, said cross-examination not being within the scope of the direct exam-

ination. The entire direct examination of witness Yokono, including obections, covered only three full pages of the record, and embraced merely the execution and authenticity of the purported By-Laws (R. 85-88). Despite objections as set out below, appellee was permitted to conduct a lengthy cross-examination covering 56 pages of the printed record (R. 94-101, 136-165, 172-189), the full substance of which tended to show that the Waipahu Auto Exchange, Limited, was an informally operated corporation; that no formal resolutions were adopted relating to the conduct of said corporation's business with plaintiff-appellant; that Anthony Yee, President of said corporation, with the sanction of witness Yokono, established and carried out the business arrangements of Waipahu Auto Exchange, Limited, with plaintiff-appellant; that the officers and directors of Waipahu Auto Exchange, Limited, permitted Anthony Yee, president of said corporation, to act in its behalf with finance companies without formal authorization therefor; that the corporate books and records of Waipahu Auto Exchange, Limited, were not complete and accurate; and that there were additional personal transactions between Yee, Yokono and others affecting said corporation.

Appellant objected numerous times to the fact that appellee was conducting its cross-examination beyond the scope of the direct examination (R. 94, 96, 97-98, 99, 137-139, 143-144, 146, 149, 153-154, 163-164). For the sake of brevity only certain of the objections will be quoted in order to show that appellant made known to the trial judge the scope of its objections and the reasons therefor.

Record, pages 96-97:

> "Q. (By Mr. Cades): Mr. Yokono, were you treasurer of the Company?
>
> Mr. Saunders: If your Honor please, I object to the question as not being within the scope of the direct examination.
>
> The Court: Overruled."

Record, pages 97-98:

"Mr. Saunders: If your Honor please, I think it is obvious by now to the Court that this is getting very far afield from the subject of (1) the execution of a document purporting to be by-laws, and (2) a discussion, or at least a reference to a meeting in which the by-laws were signed. Now, that was the limits of Mr. Yokono's direct examination, and Counsel is now going very far afield in trying to prove authority by this witness when his direct examination did not encompass authority.

The Court: Overruled."

Record, pages 143-144:

"Mr. Saunders: The only thing that I want to make clear is for the record to show we object to all of the questions that defendant is now asking. We would like to have a continuing objection on the grounds that our direct examination was limited solely to the scope that this witness was called to identify.

The Court: I know you have made that objection two or three times. I don't consider it valid on that basis. Counsel for the defense may ask questions at any time that you would have a perfect right to object to and have a ruling on, but on a general objection I, up until now, can't see anything that justifies a sustaining of the objections. It has been ruled on adversely.

Mr. Saunders: My only point in asking that is that otherwise I am going to have to be a literal 'jack-in-the-box' on every question he asks.

The Court: I don't know that you do, but you have discretion in the matter. I have already ruled on your main proposition, that the witness having been called for a limited special purpose, on cross-examination Counsel can't go outside of that scope. I have already ruled on that and said that he could under the circumstances of the case.

Mr. Saunders: Your Honor said that he could go without the scope?

The Court: Yes, under the circumstances of the case he can inquire as to all matters that he has inquired into."

Record, pages 153-154:

"Mr. Saunders: If your Honor please, we don't like to jump up and down and interrupt the testimony. Would it be possible to allow us a continuing objection to all questions pertaining to the banking procedure which Mr. Cades is about to go into on the grounds that I just asserted?

The Court: Well, I think it has been made sufficiently clear as to what he is going into has just now been recently gone into so that I think I can entertain that as a general objection, and within that particular range I hold that the examination is proper and the objection is overruled. You may have an exception."

Record, pages 163-164:

"Mr. Saunders: If your Honor please, in the meantime could we make it clear that we would like to renew the same objection we made. He has kind of gotten far afield from the banking situation now and is going into car sales and finance arrangements. We would like to make it clear we are objecting to the entire line of testimony now being presented by Counsel for the defense.

The Court: Well, it more or less seems to me to go to the matter as to what this witness, who said he was treasurer of the Company, knows, or knew, about the natural affairs of the Company. I think it is permissible.

Mr. Saunders: Could we clarify one thing first, your Honor. Could we have the reporter check back on her notes, and see whether Mr. Yokono ever stated that he was treasurer. My recollection is that he did not.

The Court: Well, from my angle it doesn't make any difference in the situation whether it was said on direct examination or whether he said it on cross-examination. I am sure that he made the statement that he was, and it was in connection with either the

articles of incorporation, had relation to that, or as to the by-laws, or purported by-laws, whichever one you may choose to refer to those as, and the fact has been submitted on the stand, claimed that he was the treasurer. Examinations as to his knowledge of the financial affairs of the Company are matters of importance."

3. The District Court erred in finding in paragraph 6 of the Findings of Fact that Anthony Yee "as such President endorsed and cashed said checks" (R. 20).

4. The District Court erred in finding in paragraphs 7 an 8 of the Findings of Fact that Anthony Yee was acting in his capacity as President of Waipahu Auto Exchange, Limited, in presenting for payment and cashing checks listed therein (R. 20-21).

5. The District Court erred in finding in paragraph 9 of the Findings of Fact that Anthony Yee was acting in his capacity as President of Waipahu Auto Exchange, Limited, in presenting and cashing checks described therein (R. 22).

6. The District Court erred in finding in paragraph 12 of the Findings of Fact that "the deposit by the Plaintiff of a check cashed for the corporation by Anthony Yee constituted a representation to the bank that Anthony Yee was authorized to cash checks" (R. 23).

7. The District Court erred in making such a broad finding in paragraph 13 of the Findings of Fact that "the Treasurer was relying upon the President for the financial operations of Waipahu Auto Exchange, Limited" (R. 24).

8. The District Court erred in concluding in paragraph 1 of the Conclusions of Law that by virtue of his office as President of Waipahu Auto Exchange, Limited, Anthony Yee had prima facie authority to endorse negotiable paper and receipt payment thereon on behalf of said corporation (R. 24).

9. The District Court erred in concluding in paragraph 2 of the Conclusions of Law that the acts of officers and directors of Waipahu Auto Exchange, Limited, in per-

mitting the President to make certain financial arrangements for said corporation, impliedly authorized the President, Anthony Yee, to endorse the checks in question and receive payment therefor on behalf of said corporation (R. 24).

10. The District Court erred in concluding in paragraph 4 of the Conclusions of Law that "Anthony Yee dealt for the corporation *in the affairs of its financing* with the knowledge of its officers and directors" (italics ours), since the language in italics is so broad as to be misleading, and should have been limited to dealing *in the negotiations with finance companies for the assignment of conditional sales contracts* (R. 25).

11. The District Court erred in concluding in paragraph 3 of the Conclusions of Law that the President, Anthony Yee, had apparent authority to endorse the checks in question and receive payment therefor on behalf of said corporation (R. 24).

12. The District Court erred in concluding in paragraph 6 of the Conclusions of Law that each of said checks had been paid in accordance with the terms thereof (R. 25).

13. The District Court erred in entering its Judgment dismissing the action upon its merits and rendering judgment in favor of the defendant (R. 26).

SUMMARY OF ARGUMENT

I

Appellant brought suit because appellee bank charged appellant's account with twelve checks drawn by appellant upon appellee bank made payable to Waipahu Auto Exchange, Limited. The twelve checks were endorsed in the corporate name by Anthony Yee as president and were cashed by Anthony Yee. The validity of the endorsement and payment is questioned. A prima facie case was established by appellant by a showing that appellant had had on deposit in appellee bank the money represented by said

checks and that appellant had demanded repayment of the same, which demand was refused. Payment by the drawee bank in accordance with the order of the drawer is an affirmative defense to an action brought by a depositor against his bank. The debtor-creditor relation having been established it then became incumbent upon appellee bank to establish payment, the burden of proof being on the bank.

II

Although the trial judge concluded that Anthony Yee, by virtue of his office as president, had prima facie authority to endorse and cash the checks in question, appellant contends that the weight of authority and preferable view is that a corporate president does not have such prima facie authority by virtue of his office alone.

To rebut any suggestion of express or implied authority in the president to do the acts in question, appellant at the trial sought to introduce into evidence what purported to be the By-Laws of Waipahu Auto Exchange, Limited, the payee corporation, through the testimony of witness Yokono, one of the incorporators, and of Herbert K. H. Lee, also an incorporator, and the attorney for the incorporators of said corporation. The offer was denied. Appellant contends that the denial of this offer was prejudicial and reversible error for the reason that the By-Laws contained provisions bearing directly upon the authority of the president and other officers of the corporation. The contention of the appellant is that the By-Laws were adopted in the manner provided by statute by the incorporators at the time of incorporation and that the ruling of the judge was therefore error.

III

The testimony of witness Yokono adduced on cross-examination, which testimony was substantially the only evidence favorable to appellee bank, did not establish

express or implied authority in Anthony Yee to endorse and cash the checks in question. While Yee did arrange the business relations of Waipahu Auto Exchange, Limited, with appellant and other finance companies, he was not expressly authorized to negotiate or cash any checks received from such companies; nor was it necessary that he have the power to endorse and cash checks in order for him to carry out the powers that were conferred upon him. Accordingly, appellant contends that there was no express or implied authority in Anthony Yee to endorse and cash the checks in question, and that it was error for the trial judge to conclude that he did have such implied authority.

IV

The evidence adduced at the trial, including the testimony of witness Yokono adduced on cross-examination did not establish apparent authority in Anthony Yee to endorse and cash the checks in question. There was no evidence adduced that any manifestation was made by the corporation or by any of its officers and directors which would justify a reasonable person in assuming that Yee had such authority. There was no indication that any of the officers or directors knew that Yee was holding himself out as authorized to do this. There was no evidence of knowledge by the appellee bank of any manifestation of authority that might possibly have been made by the officers and directors of Waipahu Auto Exchange, Limited, or of any reliance thereon. Appellant contends, therefore, that it was error for the trial judge to conclude that Anthony Yee had apparent authority to endorse and cash the checks in question.

V

Evidence adduced by appellee bank from witness Yokono, the treasurer of Waipahu Auto Exchange, Limited, the payee corporation, in an endeavor to show authority in

Anthony Yee to endorse and cash the checks in question, was obtained upon cross-examination. Yokono had been called by appellant for the limited special purpose of identifying and authenticating a document purporting to be the By-Laws of Waipahu Auto Exchange, Limited, and for no other purpose. Despite this, appellee bank, over timely objection, was permitted to conduct the cross-examination referred to. If the testimony of Yokono in any way tends to establish authority on the part of Anthony Yee to endorse and cash these checks, then appellant contends that it was prejudicial and reversible error for the trial court to permit the cross-examination to extend beyond the scope of the direct examination, thereby permitting appellee bank to present evidence upon its case in chief by leading and suggestive questions and through a witness which the appellant did not call for that purpose and by whose testimony appellant did not necessarily care to be bound.

ARGUMENT

I. SINCE PAYMENT IS A DEFENSE, APPELLANT ESTABLISHED A PRIMA FACIE CASE BY SHOWING THAT IT HAD MONEYS ON DEPOSIT IN APPELLEE BANK, AND THAT IT DEMANDED REPAYMENT OF THESE MONEYS, WHICH DEMAND WAS REFUSED.

It is unquestioned that appellant finance corporation was a depositor in the appellee bank, having at all pertinent times sufficient funds on deposit in a commercial account in appellee bank to cover all checks drawn by appellant, including the twelve checks, proper payment of which is in dispute. It is also unquestioned that appellant demanded repayment of the total sum of $17,726.00, being the aggregate of the twelve checks in question, and tendered the twelve checks to appellee. This demand was refused. These facts were admitted by appellee (R. 14, 40, 41, 43-44), and thus established a debtor-creditor relationship between appellant depositor and appellee bank.

Although no Hawaiian cases are to be found on the subject, it is settled common law that a depositor suing a bank on a check claimed to have been wrongfully paid need allege and prove merely the deposit, the demand for repayment and the refusal of the bank to pay.

In 5 Michie, *Banks & Banking* (Permanent Ed., 1932), sec. 368c, pp. 713-714, it is stated:

> "In a suit by a depositor to recover a deposit from a bank, after he has offered evidence of the amount of the deposit and the balance due after crediting the bank with checks which he admitted signing, it is incumbent on the bank to offer evidence that a payment made on a controverted check was a proper credit on the account. The bank has the burden of showing that the payment of a check was to the payee or to a person authorized to receive payment, or that the depositor was guilty of negligence, precluding him from recovering for payment to the wrong person. This is in pursuance of the ordinary rule that the banker must ascertain at his peril the identity of the payee of a check."

And in 5 Zollmann, *Banks & Banking* (Permanent Ed., 1936), sec. 3450, the text states:

> "Burden of showing payment of a conceded deposit is on bank or its receiver and should be properly pleaded. The depositor need not prove that the payment has not been made."

As stated in 9 Corpus Juris Secundum, *Banks & Banking*, sec. 327, p. 661:

> "Although there is authority to the effect that a plaintiff suing for a bank deposit must prove nonpayment, the generally accepted rule is that, where a bank deposit is shown or conceded, the burden of proving payment rests on the bank, which has the burden of showing that a payment was made on the authority of the depositor."

Hawaii has expressly adopted the common law by statute. (Laws of 1892, c. 57, s. 5, now sec. 1, Revised Laws of Hawaii 1945.)

The case of *Virginia-Carolina J. S. L. Bank* v. *First & Citizens Nat. Bank,* 197 N.C. 526, 150 S.E. 34 (1929), was a civil action by the drawer to recover of the drawee bank, the amount of its check, paid by said bank, without the valid endorsement of the payees, and charged to the account of the drawer (and also to hold the endorsers on their guarantees of payment). The check in question was made payable to "E. A. Matthews, atty. and James Squire, Bwr." and endorsed "E. A. Matthews, atty., James Squire, Bwr., by E. A. Matthews, Atty." No evidence was offered at the trial showing or tending to show that James Squire had authorized the endorsement. The issue of whether or not the payees named were paid was submitted to the jury, and the verdict was that the bank had paid on an unauthorized endorsement.

On appeal, it was urged that the trial court erred in refusing to dismiss the action at the close of the plaintiff's evidence, it being argued that the plaintiff had made no showing that Matthews was without authority to make the endorsement. The court, in holding there was no error, said in 150 S.E., at page 37:

> "The deposit, in the absence of a special agreement to the contrary, creates a debt; this debt can be discharged only by a payment or by payments made to the creditor, or to his order. The burden is on the bank as debtor to show payment to the depositor as creditor or to a person or persons to whom the depositor has authorized payment to be made."
>
> "* * * Where it is admitted or established by evidence that at a certain date a depositor had on deposit with his bank, to his credit, and subject to his check, a sum of money, and the bank contends that it has been discharged of liability by reason of such deposit, either in whole or in part, by the subsequent payment

> of a check drawn by said depositor on said bank, the burden is on the bank to show that the amount of the check was paid to the payee named in the check," * * * (or on the payee s valid endorsement) . * * * "In the absence of evidence showing such payment, the bank remains liable to the depositor, notwithstanding payment of the amount of the check to a stranger, and notwithstanding the check has been marked 'Paid' by the bank, and charged on its books to the account of the drawer."

The foregoing proposition of law is restated in various types of cases involving a depositor suing the drawee, although on their facts not directly in point.

In *O'Neil* v. *New England Trust Co.,* 28 R.I. 311, 67 Atl. 63, a case involving a depositor's suit against his bank for paying out the plaintiff's funds on garnishment proceedings to reach the assets of a stranger with the same name, the court in ruling that a verdict for the plaintiff was properly directed, said:

> "The plaintiff made out a prima facie case when he proved that he deposited the money in question with the defendant and demanded the same from it. The burden of proving payment to or for the use of the plaintiff was upon the defendant, and it failed to sustain the same."

In *Fourth & Central Trust Co. v. Rowe,* 122 Ohio St. 1, 170 N.E. 439, 441, where the administrator of a depositor in a savings account sued the bank for repayment of a sum paid out by the bank on what was claimed to be a forged check. The court, in holding that the trial court was in error in placing the burden of proof as to the issue of forgery on the plaintiff below, said in 170 N.E., at p. 441:

> "The claim of the bank in its first defense was that of payment; and it is well established that such defense is an affirmative one, and that the burden to show the same is upon the party claiming it, which in this case would be the bank."

To the same general effect see:

Boardman v. Connecticut Savings Bank, 133 Conn. 396, 51 Atl. (2d) 925 (forged endorsement);
Levin v. Northwestern Nat'l Bank, 154 Pa. Super. 94, 35 Atl. (2d) 769 (forged check), and cases collected in
5 Michie, *Banks & Banking* (Perm. ed., 1932), sec. 368c, and in
5 Zollmann, *Banks & Banking* (Perm. ed., 1936), sec. 3450.

The few cases to the contrary apparently overlook the foregoing fundamental principal of law.

cf. *Duncan* v. *National Bank of Decatur,* 285 Ill. App. 305, 1 N.E. (2d) 902.

Indeed, the placing of the burden of proof on the bank is well founded in logic as well as in law. The contract of a bank to its depositor is that it will repay to the depositor on demand or according to the depositor's direction (See 9 *C.J.S.,* Banks and Banking, sec. 330). Once a depositor determines that he desires to make the payment to a given payee he should be entitled to rely on the bank's contract that it will pay according to the direction of the depositor. The bank is in a position to fully protect itself by paying only to a known payee or on a genuine endorsement (see *City of St. Paul v. Merchants' Nat. Bank,* 151 Minn. 485, 187 N.W. 516, 22 A.L.R. 122, for a general discussion). Thus, if the bank has properly identified the payee, it will be able to prove that payment was made to the payee himself; if the bank has satisfied itself that the endorsement is genuine, then it should be able to prove that fact in court. In the case of a corporate payee, as in the instant case, it is incumbent on the bank to deposit the check in the corporation's duly opened account (which in this case was in another bank [R. 29-30]), or if the agent of the payee insists on cashing the check, then to require proof of his authority to

receive cash for a corporate check. If the required proof of authority is forthcoming, then the bank is in a position to bear the burden of proof in court. The risk involved on the bank in fulfilling its contract is a calculated one, best described as one of the costs of the banking business. From the depositor's standpoint, he is not present in the face to face transaction involved in cashing the check, but he relies on the bank's undertaking. Therefore he should not be and is not required by law to prove that the payee was or was not paid.

It follows that the appellant depositor proved its prima facie case, and it thus becomes necessary to fully examine the remaining evidence properly before the court to determine whether or not appellee established its affirmative defense of payment.

II. APPELLEE BANK DID NOT PROVE PAYMENT OF THE CHECKS IN QUESTION TO THE NAMED CORPORATE PAYEE, BUT, RATHER, IT WAS SHOWN THAT CHECKS MADE PAYABLE TO THE CORPORATE PAYEE WERE PAID IN CASH TO THE PRESIDENT THEREOF ON HIS PURPORTED ENDORSEMENT FOR THE PAYEE.

All of the checks in question were made payable to Waipahu Auto Exchange, Limited, a Hawaiian corporation (R. 6, 9, 40). Although there is no direct evidence of the circumstances surrounding the cashing of the checks, an examination of each check (R. 53-64), appellee's admissions in its answer (R. 6-9), and orally (R. 42), leave the obvious inference that Anthony Yee was paid cash on presentation of each check. The trial court properly so found (R. 20-21). Although it is admitted that Anthony Yee was the then president of the corporate payee, there is no showing in the record that he, an individual, was expressly authorized to endorse and cash corporate checks.

A. THE WEIGHT OF AUTHORITY AND THE BETTER VIEW IS THAT A PRESIDENT OF A CORPORATION DOES NOT HAVE PRIMA FACIE AUTHORITY MERELY BY VIRTUE OF HIS OFFICE AS PRESIDENT, TO ENDORSE AND CASH CHECKS PAYABLE TO HIS CORPORATION.

Appellant submits that there is no magic in the word "president." A president of a corporation is nothing more than another agent. He is an officer, to be sure, and the titular executive head of the company, but he, like any other officer, must look to the board of directors for his power. It is common knowledge that corporations differ greatly in the powers they award their presidents. A president can, we suppose, be authorized to carry on all business transactions for a corporation; indeed, he can act as delivery boy and janitor, too. Or he can be a mere figurehead. But, it is not logical to infer that a president of a corporation, merely because he is such, can walk into a bank,[3] sign over a check made payable to the corporation and walk out with the cash.

Appellant respectfully submits that the law, as in most instances, follows logic and does not, merely by virtue of his office, grant such power to a president.

Brady, *Forged and Altered Checks* (1925), sec. 49, p. 209, states:

> "* * * The president of a corporation, for instance, has no authority merely because of the fact that he is president to endorse checks payable to the corporation. Anyone who deals with such an official, thinking otherwise, does so at his peril."

Cases on this proposition are collected in 94 A.L.R. 567, which, in general, are in accord with Brady, supra.

A case in point therein cited is *Economy Auto Supply Co.* v. *Fidelity Union Trust Co.* (1928), 105 N.J.L. 206, 144

[3] And it is to be kept in mind that in our present case the defendant bank was not the bank which handled the corporate payee's account (R. 22, 29-30).

Atl. 30. In that case the drawer sued defendant drawee bank for moneys claimed to have been paid out of the funds of the plaintiff's bank account upon unauthorized endorsements of the corporate payee. The checks in question were endorsed by the president of the corporate payee to another corporation, and paid to the endorsee by the bank.

In sustaining a directed verdict by the trial court in favor of the plaintiff drawer, the appellate court held that the power to endorse checks was not conferred on a corporate president under his general powers, and further held that in the case there presented, there was no showing of specific authority granting that power. See also *Hibernia Nat. Bank* v. *National Bank of Commerce,* 204 La. 777, 16 So. (2d) 352, wherein it is stated, in 16 So. (2d), on page 357:

> "* * * It is also the universal rule of law that the president of a corporation by virtue of his office, does not have the power to endorse checks, drafts, notes and other obligations payable to the corporation."

Cases in which the authority of the president of a corporation to endorse and pass title to negotiable instruments has been upheld are generally distinguishable for the reason that in such cases the president in negotiating the same has been acting for an apparent corporate purpose. Such is not the case here, for no apparent corporate purpose would be served by entrusting substantial sums of cash to Mr. Yee. Quite the contrary, for it is apparent that such a course of conduct would make proper corporate accounting and bookkeeping difficult and give rise to the possibility of defalcation. The proper corporate and banking practice would be to require the check to be deposited in the regular corporate bank account.

It is therefore submitted that Anthony Yee did not have any prima facie authority to endorse and cash corporate checks just because he was president, as concluded by the trial judge (R. 24).

B. IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE THE BY-LAWS OF THE CORPORATE PAYEE, WHICH CONTAINED PROVISIONS MATERIAL TO THE AUTHORITY OF THE PRESIDENT AND OTHER OFFICERS.

The purported By-Laws of Waipahu Auto Exchange, Limited, were, on the objection of appellee bank, not admitted in evidence. Appellant submits that this exclusion was prejudicial error, because the By-Laws contained several sections very pertinent to the question of the authority of the corporation president to endorse and receive cash for checks made payable to the corporation.

In the By-Laws financial duties are clearly delegated to the treasurer, not the president. To quote:

> "The Treasurer shall have custody of all the funds, notes, bonds and other evidences of property of the corporation, and shall be responsible for keeping all the books and accounts of the corporation * * *" (R. 117).

Likewise, the By-Laws require the signatures of two officers on corporate documents and instruments:

> "ARTICLE V.
>
> EXECUTION OF INSTRUMENTS
>
> "Section 1. Proper Officers. Except as otherwise provided by these by-laws or by law, all checks, drafts, notes, bonds, acceptances, deeds, leases, contracts, and all other documents and instruments, shall be signed, executed and delivered by the President or a Vice-President and by the Treasurer or the Secretary; provided, however, that the Board of Directors may from time to time by resolution authorize checks, drafts, bills of exchange, notes, orders for the payment of money, licenses, endorsements, stock powers, powers of attorney; proxies, waivers, consents, returns, re-

> ports, applications, notices, agreements or documents, instruments or writings of any nature to be signed, executed and delivered by such officers, agents or employees of the corporation, or any one of them, in such manner as may be determined by the Board of Directors." (R. 118.)

The Hawaiian statute pertaining to the adoption of corporate by-laws is quoted in its entirety in Appendix I. The pertinent part is as follows:

> "* * * provided, however, that by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association; * * *." (Hawaiian C. C. 1859, s. 1431, as amended—now sec. 8335, Revised Laws of Hawaii 1945.)

It was shown at the trial that the by-laws were adopted in the following manner:

Herbert K. H. Lee, an attorney in Honolulu, drew up the Articles of Incorporation and proposed By-Laws for Waipahu Auto Exchange, Limited (R. 109), preparing spaces for only the four initial stockholders, and the four real incorporators, Anthony Yee, who was to be President, Fred H. Shintaku, who was to be Vice-President and General Manager, Kay Y. K. Pang, who was to be Secretary, and Takeshi Yokono, who was to be Treasurer (R. 110, 105, 107). Anthony Yee picked up the papers at lawyer Lee's office (R. 109), and a meeting of the four incorporators was held on November 23, 1948, at the corporation office at Waipahu, a distance of about twenty miles from the attorney's office, the transaction being handled this way to avoid a trip to Honolulu by the said four incorporators (R. 85-89, 132-133). At the meeting, the proposed By-Laws and Articles of Association were read, discussed and signed (R. 89).

The signing of the By-Laws by the four incorporators was an express adoption in writing, the paragraph preceding the signatures providing:

> "The undersigned, Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang and Takeshi Yokono, being the incorporators of Waipahu Auto Exchange, Ltd., at the incorporation of the same at Honolulu, Territory of Hawaii, have adopted the foregoing as the by-laws of the corporation, this 23rd day of November, A.D. 1948" (R. 122).

The By-Laws and Articles were returned to lawyer Lee (R. 110) and since Hawaiian law does not require that By-Laws be filed, on November 27, 1948 (R. 103), only the Articles were filed at the Territorial Treasurer's Office. The Articles were returned by the Treasurer's Office to lawyer Lee, however, since he had overlooked the fact that a Hawaiian statute requires that there be five incorporators (R. 111). Hence lawyer Lee signed the Articles as a fifth "dummy" incorporator (R. 111, 105). Although he did not sign the By-Laws (R. 122), it is undisputed that he had drawn them up, that he approved them by implication (R. 111), and thereafter, during the life of the corporation, had kept the By-Laws in his file as though they were the functional By-Laws of the corporation (R. 127).

It is also undisputed that lawyer Lee was not a stockholder of the corporation (R. 127) and that he was just a dummy incorporator (R. 111). Furthermore, the Treasurer of Waipahu Auto Exchange, Limited, Takeshi Yokono, testified that these were the By-Laws under which the corporation acted (R. 88).

After the foregoing facts had been developed, appellant submitted to the trial court that the applicable statute pertaining to the adoption of the By-Laws had been complied with—if not strictly, at least substantially, which is all that the law requires—and asked that the By-Laws be received in evidence (R. 127, 134). Appellee bank made several objections to the admission of the By-Laws covering the four following points (R. 134-135). Appellant's discussion follows each point.

1. "* * * Because it affirmatively appears that they were not adopted by the corporation in accordance with the provisions of law and in fact are not by-laws; * * *."

Appellant has shown by the facts set out above that there was strict compliance, or at least substantial compliance, with the applicable statute. Appellant submits that it is the law that in complying with mandatory statutes pertaining to the adoption of by-laws, substantial compliance is all that is required. 8 Fletcher, *Corporations* (Perm. Ed., 1931), sec. 4173, p. 649.

However, appellant submits that in this instance there was strict compliance with the statute. Even though four of the five incorporators (the four with the entire interest in the corporation) expressly adopted the By-Laws in writing (R. 122), the statute does not require that the adoption be in writing. The fifth "dummy" incorporator (R. 111) drew up the By-Laws (R. 109), approved them by implication (R. 111), and kept the executed copy in his file as though it constituted the functional By-Laws of the corporation (R. 127). Certainly, even though he did not sign them, this constituted an actual adoption of the By-Laws by the fifth "dummy" incorporator, if not expressly —then impliedly. In VII Wigmore on *Evidence* (3rd Ed., 1940), sec. 2134 (2), p. 580, it is stated: "accordingly, if there is no signature, and the substantive law makes no requirement as to a signature, the execution may be established" * * * "by evidencing some oral act of acknowledgment or assent."

2. "* * * secondly, and equally important, because there has been no showing made—The statute providing that there is no constructive notice of the By-Laws on outsiders, there is no showing made that we had or could have obtained actual notice of the by-laws; * * *."

Appellant submits that this objection is not well taken because the By-Laws were entirely relevant on the issues

of the express or implied authority of Anthony Yee to endorse and receive cash for checks made payable to the corporation. Whether or not the bank had actual or constructive notice of the By-Laws in no way affects the actual authority granted or limited thereby since this involved the internal workings of the corporation. This was expressly brought to the attention of the trial court (R. 135-136).

3. "* * * next, on the ground that it appears from the evidence that has been adduced so far that even the statutory requirement of having a certified copy available, certified by the secretary and available for examination by the stockholders, which appears in this same section, was not complied with; * * *."

Appellee was apparently making reference to the fact that the cited statute (set out in Appendix I) in a separate paragraph from the paragraph dealing with the adoption of the By-Laws states that a copy of the By-Laws shall be maintained at the corporation office for inspection by the stockholders or members. It is obvious that such a requirement could not possibly affect the validity of the adoption of the By-Laws or its admissibility in evidence. 8 Fletcher on *Corporations* (Perm. Ed., 1931), sec. 4173, p. 650.

4. "* * * next, on the ground that the only testimony that they acted as though these were the by-laws is a statement by the attorney that he assumed they were the by-laws because he had them in the file all during the existence of the corporation."

This last objection by appellee was evidently aimed at appellant's statement regarding the admissibility of the By Laws (R. 133-134). Appellant had further bolstered its argument that these were the authentic By-Laws by making reference to the fact that, even if not properly adopted these By-Laws had been acted upon as if they were the By-Laws of Waipahu Auto Exchange, Limited. In doing

so, appellant was referring to the testimony of Takeshi Yokono that these were the By-Laws under which the corporation acted (R. 88). This was in addition to the testimony of the attorney, referred to in the quoted portion of the objection. Accordingly, appellee's statement is in error.

The trial court was evidently impressed by the first of these four objections but not by the last three objections. Denying the admission into evidence of the purported By-Laws, the court stated as follows:

> "In the absence of any meeting of either stockholders or directors with relation to these purported by-laws the offer is denied at the present time." (R. 136)

However, there would appear to be no requirement in section 8335, Revised Laws of Hawaii 1945, referred to above and set out in Appendix I, requiring the incorporators, as distinguished from stockholders, to adopt the by-laws at a meeting. Appellant submits that this ruling constituted reversible error in the face of the foregoing facts.

III. THE RECORD DOES NOT REFLECT ANY BASIS FOR THE TRIAL COURT'S CONCLUSION THAT ANTHONY YEE, THE PRESIDENT OF THE CORPORATE PAYEE, HAD IMPLIED AUTHORITY TO ENDORSE THE CHECKS IN QUESTION AND RECEIVE PAYMENT THEREFOR ON BEHALF OF SAID CORPORATION.

The trial court concluded that Anthony Yee would have this implied authority "by virtue of the acts of officers and directors of the corporation in permitting the president to make financial arrangements for the corporation" (R. 24).

It is submitted by appellant that this conclusion was clearly erroneous, there being no evidence in the record to support such a conclusion.

A. THE RECORD MERELY SHOWS THAT ANTHONY YEE WAS PERMITTED TO DEAL WITH APPELLANT FINANCE COMPANY AND OTHER FINANCE COMPANIES IN THE ASSIGNMENT OF AUTOMOBILE CONDITIONAL SALES CONTRACTS.

The only evidence pertaining to Anthony Yee making "financial arrangements for the corporation" (Waipahu Auto Exchange, Limited) is to be found in the testimony of Takeshi Yokono, the treasurer and one of the incorporators, on his cross-examination by appellee. This testimony, for reasons hereinafter set forth, we submit, was erroneously admitted into evidence. However, it is to be noted that the "financial arrangements" only embraced dealings with the finance companies regarding the assignment of conditional sales contracts and that is all.

The following pages of testimony include all evidence in the record on the above issue: R. pp. 97, 99-100, 159-161. Such testimony, appellant submits, clearly shows that Anthony Yee was not the general manager of Waipahu Auto Exchange, Limited (R. 96-97), and that his authority in dealing with the financial affairs of the corporation was strictly limited to dealing with finance companies from which, we submit, no authority to cash checks can be implied.

Appellant further submits that this testimony will not support the broad language used in the Findings of Fact No. 13, to-wit: "The Treasurer was relying upon the President *for the financial operations of Waipahu Auto Exchange, Ltd.*" (R. 24) (Italics supplied.) Likewise the language used in the trial court's Conclusion of Law No. 2 and No. 4 with respect to financial arrangements made by the president (R. 24-25), it is submitted, is too broad. The trial court concluded in Conclusion of Law No. 2, "That by virtue of the acts of officers and directors of the corporation in permitting the President *to make financial arrangements* for the corporation * * *" the President had implied author-

ity to cash the checks in question (R. 24). In Conclusion of Law No. 4, the court's language states, "That Anthony Yee dealt for the corporation *in the affairs of its financing* with the knowledge of its officers and directors" (R. 25). In each of the foregoing instances, appellant submits that the court's language is too broad and fails to properly evaluate the abovementioned testimony to the effect that the President's authority was limited to making financial arrangements with the finance companies and not that the President conducted all financial operations of the corporation.

B. EXPRESS AUTHORITY TO REPRESENT A CORPORATION IN CERTAIN FINANCING OPERATIONS NOT INVOLVING BANKING TRANSACTIONS DOES NOT GIVE RISE TO AN IMPLIED AUTHORITY TO CASH CHECKS MADE PAYABLE TO THAT CORPORATION UNLESS IT IS NECESSARY TO THE EXPRESS AUTHORITY GRANTED.

Appellant submits that the foregoing evidence cannot support a finding that Anthony Yee had implied authority to endorse and cash checks made payable to the corporation.

Implied authority is a form of actual authority implied from powers expressly given, or from the circumstances of the case. It may arise as an incident to authority expressly granted, in which case it must be reasonably necessary to the exercise of the express authority granted.

As stated in 2 *C.J.S.*, Agency, sec. 99, p. 1230:

> "* * * to permit the inference of authority in an agent it must appear that the act or transaction involved was necessary to the promotion of the duty or execution of the purpose expressly delegated to the agent * * *.
>
> "The test is whether, in case of a failure to perform the particular act in dispute, the agent could effectuate the purpose of his employment, the only powers included in the implied mandate being such as are, as a practical matter indispensable and essential to carry out the duties actually delegated to the agent * * *."

And it is to be kept in mind that an express limitation such as is contained in the By-Laws of Waipahu Auto Exchange, Limited (as argued *supra*) acts to negative any grant of authority otherwise inferred. (See 2 *C.J.S.*, Agency, sec. 99, 1230.)

In discussing the specific point of authority to endorse commercial paper properly received by the agent, it is said in 2 *C.J.S.*, Agency, sec. 112, p. 1303:

> "* * * so one authorized to accept checks or other negotiable instruments as payments of debts to his principal is not empowered to sell, transfer or indorse them, and this is true, although the agent is given authority to collect in cash, * * *."

In *Jackson Paper Mfg. Co. v. Commercial Nat. Bank,* 199 Ill. 151, 65 N.E. 136, the court stated at 65 N.E. 138:

> "The weight of authority seems to be in favor of the contention of appellant that authority to indorse commercial paper can only be implied where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent. * * * The power of an agent to bind the principal by the making or indorsing of negotiable paper can only be charged against the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such a power, or where the power is a manifestly necessary and customary incident of the character bestowed upon the agent, and where the power is practically indispensable to accomplish the object in view. * * *."

Jackson Paper Mfg. Co. v. Commercial Nat. Bank, supra, was a case brought by appellant-payee of a check against the drawee bank for paying a corporate check upon the endorsement of the supervisor and manager of the payee's paper

mill purportedly acting for the corporation, it being held that the supervisor and manager had no implied authority to negotiate this check.

Applying the law to the facts at hand, all that Anthony Yee was authorized to do in regard to the financing arrangements was to handle the dealings of Waipahu Auto Exchange, Limited, with the finance companies concerning the sale of automobile conditional sales contracts. In the case here presented, appellant finance company protected itself by directing appellee bank to pay the money to the corporation, Waipahu Auto Exchange, Limited. The money was paid instead to an individual. Appellant submits that there is no necessity or custom shown requiring or permitting that individual, even though he be president, to receive cash for checks clearly payable to his principal.

On the contrary, it is undisputed that the office of treasurer of this corporate payee was held by the witness, Yokono (R. 94); that not Yee, the president, but Yokono, in his capacity as treasurer, and as a part of his regular duties attended to the making of deposits for Waipahu Auto Exchange, Limited (R. 144-145); that a corporation bank account was maintained in the Waipahu Branch, Bank of Hawaii, and that all of the checks drawn thereon by Waipahu Auto Exchange, Limited, during its corporate existence, were signed, not by Yee, the president, but by T. Yokono, Treasurer, and countersigned by F. H. Shintaku, Vice-President (R. 29-30). There was no showing of necessity for Anthony Yee in his dealings with the finance companies to receive cash from the banks for checks payable to the corporation.

Nowhere does it appear that the other officers of Waipahu Auto Exchange, Limited, had any knowledge of the cashing of checks by Anthony Yee. Nowhere does it appear that Anthony Yee purported to represent the corporation in any other banking transactions.

Certainly, no case was made out for the inference of implied authority in Anthony Yee for the endorsing and cashing of corporate checks. See *Doeren v. Krammer,* 141 Minn. 466, 170 N.W. 609, and *Walsh v. American Trust Co.,* 7 Cal. App. (2d) 654, 47 Pac. (2d) 323, for good discussions of implied authority to endorse and cash checks.

The rationale in support of appellant's argument that there should be no authority implied in Yee to cash checks made payable to his corporation is found in Brady, *Forged & Altered Checks,* sec. 50, p. 217:

> "* * * Every bank knows that it is customary for a corporation to deposit checks payable to it in an account standing in its own name,[4] and that it is unusual for the corporation to permit an agent to deposit its checks in his individual account or to present them to a bank for the purpose of having them cashed. Therefore, when a bank is approached by an agent, having in his possession a check payable to a corporation or individual by whom he is employed, it should take notice that something may be wrong * * *."

Here, as in the usual case, it was not customary or necessary for Yee to cash the checks just because he was allowed to represent his corporation in dealing with the finance companies. There is no showing that cash received therefrom was either required or needed in his authorized relations with such concerns.

The trial court, we submit, erred, therefore, in concluding in paragraph 2 of its Conclusions of Law (R. 24) that there was this implied authority in Anthony Yee.

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[4] Which in this case was in Bank of Hawaii, Waipahu Branch (R. 29-30). Waipahu is the town where the corporation office was located (R. 86), being some twenty miles from Honolulu (R. 132).

IV. THE RECORD DOES NOT REFLECT ANY BASIS FOR THE TRIAL COURT'S CONCLUSION THAT THE PRESIDENT, ANTHONY YEE, HAD APPARENT AUTHORITY TO ENDORSE AND CASH THE CHECKS IN QUESTION.

Without any evidence whatsoever involving the circumstances of the transactions whereby the disputed checks were cashed by the appellee bank, the trial court nevertheless concluded that Anthony Yee had apparent authority to endorse the checks in question and receive payment therefor on behalf of Waipahu Auto Exchange, Limited. This was clearly wrong.

A. THERE IS NOTHING IN THE RECORD TO INDICATE THAT WAIPAHU AUTO EXCHANGE, LIMITED, THE CORPORATE PAYEE, HELD ANTHONY YEE OUT AS POSSESSING AUTHORITY TO ENDORSE AND CASH ANY CHECKS MADE PAYABLE TO THE CORPORATION.

Apparent authority is based on estoppel. An essential element is that the principal held the agent out as possessing the authority in question—which in this case is the claimed authority of Anthony Yee to endorse and cash corporate checks.

In *Metropolitan Life Ins. Co. v. Henderson,* 92 F. (2d) 891, 895 (C.C.A.-9) The *Restatement of the Law of Agency,* sec. 27, is quoted with approval to the effect that:

> "Apparent authority to do an act may be created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."

In the same case 2 *Am. Jur.,* Agency, sec. 101, is quoted as follows:

> "Apparent authority * * * is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing."

In other words, it must be some conduct of the principal himself which causes the third party to reasonably believe that the agent is authorized to act. As stated in 2 *Am. Jur.*, Agency, sec. 103, p. 85:

> "Moreover, the apparent authority for which the principal may be liable must be traceable to him, and cannot be established solely by the acts and conduct of the agent; the principal is only liable for that appearance of authority caused by himself."

See also: *Hartline v. Mutual Benefit Health & Accident Ass'n,* 96 F. (2d) 174 (C.C.A.-5).

Nowhere in the record does it appear that anyone connected with Waipahu Auto Exchange, Limited, held Anthony Yee out as having authority to cash corporate checks. Nowhere does it appear that said corporate payee knew or should have known that he was cashing the checks in question or any other checks payable to the corporation. Indeed, the bank made this lack of knowledge possible by paying cash to Anthony Yee—so that the checks were not deposited in the corporation bank account in Waipahu.

Without having shown knowledge, actual or constructive, on the part of the principal corporation that this conduct by its president was taking place, how can it be said that the corporation held him out as possessing such authority?

B. ASSUMING THAT THE RECORD DOES ESTABLISH THAT THE CORPORATE PAYEE HELD ANTHONY YEE OUT AS POSSESSING AUTHORITY TO ENDORSE AND CASH THE CHECKS IN QUESTION, THERE IS NO EVIDENCE THAT THE APPELLEE BANK EITHER KNEW OR RELIED UPON THIS.

Again the record is bare as to the reasons why the bank cashed the checks in question on presentation by Anthony Yee. There is no showing that the checks were cashed in the furtherance of corporate business; for all that appears, the

bank was accommodating Anthony Yee and Anthony Yee alone. In order to hold the principal liable on the basis of apparent authority, the one seeking to hold the principal must have relied on conduct by the principal.

Again, in 2 *Am. Jur.*, Agency, sec. 103, p. 85, it is said:

> "* * * Furthermore, a party dealing with an agent must prove that the facts giving color to the agency were known to him when he dealt with the agent, and that he believed the agent was acting within his authority; if he has no knowledge of such facts, he does not act in reliance upon them and is in no position to claim anything on account of them * * *."

And see 1 A.L.I., *Restatement of Agency,* sec. 8, comment b, wherein it is stated:

> "Apparent authority, however, exists only with respect to a person to whom such a manifestation has been made or to whom knowledge of it comes."

Here we have neither a showing of conduct by the principal nor a showing of reliance on anyone but the agent.

C. THE APPELLEE BANK WOULD HAVE NO DEFENSE TO THE CASHING OF THE CHECKS INVOLVED IN THIS SUIT BY REASON OF APPELLANT-DEPOSITOR'S HAVING CASHED A SIMILAR CHECK NOT THE SUBJECT OF THIS SUIT UNLESS THE APPELLEE BANK COULD SHOW KNOWLEDGE OF AND RELIANCE ON THE APPELLANT-DEPOSITOR'S ACTION.

It is admitted that a check similar to those here involved was cashed in the office of appellant finance company. The date of the check so cashed was May 9, 1949, and in sequence was cashed after nine of the checks here involved had already been cashed by the banks and before the last three of the checks were likewise cashed by the banks. Appellant submits that the fact that appellant cashed said check has no legal effect on this case on the present state of the record.

All that is indicated is that in hoodwinking the bank twelve times Anthony Yee succeeded in hoodwinking appellant finance company once. There can be no ratification of an agent's acts by one other than the principal and even if there could be there is no showing that the finance company was or should have been aware of the nine prior checks having been cashed by Anthony Yee. As to the fact that the banks cashed three checks subsequent to appellant cashing one, the appellee bank cannot be heard to complain unless it was actually misled by the appellant's conduct. The record does not establish that to be the fact.

V. THE ONLY EVIDENCE POSSIBLY RELEVANT TO PROVE THE NECESSARY IMPLIED OR APPARENT AUTHORITY OF ANTHONY YEE WAS THAT ADDUCED IN THE CROSS-EXAMINATION OF TAKESHI YOKONO, THE TREASURER OF THE CORPORATE PAYEE; THAT EVIDENCE WAS ADDUCED DURING IMPROPER CROSS-EXAMINATION, AND IF IT WOULD SUPPORT SUCH FINDINGS, THE IMPROPER CROSS-EXAMINATION WAS PREJUDICIAL ERROR.

The only testimony adduced at the trial which might have any relevancy upon the authority of Anthony Yee to act on behalf of the Waipahu Auto Exchange, Limited, in financial matters was that of Takeshi Yokono, the Treasurer of that corporation. It will be recalled that this witness was called by plaintiff-appellants for the limited purpose of laying the foundation for the introduction of that corporation's By-Laws (R. 85-88), which were not admitted into evidence (R. 136). Thereafter defendant-appellee conducted a lengthy cross-examination of Yokono in an endeavor to explore the method of operation of Waipahu Auto Exchange, Limited, and the authority of Anthony Yee to act for it (R. 94-101, 136-190).

It is the settled rule in the Federal courts, which rule has been enunciated by this Court on several occasions, that a party calling a witness may restrict the cross-exam-

ination to subjects dealt with in the direct examination, the cross-examination being properly limited to matters embraced in the examination in chief only.

Aplin v. United States, 41 F. (2d), 495 (C.C.A. 9).
Chevillard v. United States, 155 F. (2d), 929, (C.C.A. 9).

In one of the leading cases on the subject, *Houghton v. Jones,* 1 Wall. 702 (1863), the United States Supreme Court held that the trial court had correctly sustained the objection to questions on cross-examination inquiring into matters not touched upon in the direct examination, stating, at p. 706:

> "The rule has long been settled, that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters he must do so by calling the witness to the stand in the subsequent progress of the cause."

In *Aplin v. United States, supra,* this Court, in a criminal action, stated in 41 F. (2d) at 496:

> "Subject to certain exceptions, not material here, it is the settled rule in the federal courts that the cross-examination of a witness is limited to matters embraced in the examination in chief."

This rule should, and does, have particular application in cases where the witness is called for purposes of identification or for a particular or formal point. In *O'Connell v. Pennsylvania Co.,* 118 Fed. 989 (C.C.A.-6), plaintiff had called a witness in a personal injury action for the limited purpose of identifying the number of a railroad car. On cross-examination, over objection, the defendant was permitted to examine this witness as to the condition of the car so identified, the theory of plaintiff's case being that it was defective. The appellate court reversed the lower court

on other grounds, but took occasion to criticize the lower court for permitting the cross-examination complained of, stating at page 991:

> "While we are disposed to concede to a trial judge wide limits in the suspension or enforcement of the rule in reference to the proper limits of a cross-examination and in respect to the order in which evidence is to be introduced, yet we must reserve to this, as a reviewing tribunal, such authority in respect to even such questions of practice as that any serious injury to the rights of the party complaining of the relaxation of the rule may be corrected by granting a new trial, if necessary."

The court went on to indicate that it felt that in that case the plaintiff had been prejudiced because the defendant asked for and obtained a directed verdict at the close of plaintiff's case based on the affirmative evidence adduced on cross-examination of this witness as to the condition of the railroad car.

And in *McCrea v. Parsons,* 112 Fed. 917 (C.C.A.-7), one of the plaintiffs was called as a witness for the limited purpose of identifying a stated account upon which suit was brought. The appellate court held that the trial judge had correctly sustained an objection to cross-examination extending to the nature of the transaction between the parties, as such testimony had not been the subject of the examination in chief and went to the affirmative defense of illegality of the transactions giving rise to the stated account.

See also 5 Jones, *Commentaries on Evidence* (2nd ed., 1926), sec. 2341, p. 4580, and cases collected therein.

Also it has been held not to be error to sustain objections to cross-examination designed to bring out evidence supporting the defendant's case or his affirmative defense.

United States v. Hornstein, 176 F. (2d) 217 (C.C.A.-7).
Goddard v. Crefield Mills, 75 Fed. 818 (C.C.A.-2).

So much for the rule. Witness Yokono was called for the limited purposes of authenticating and identifying a document (R. 85-88). On cross-examination over timely objections (R. 94, 96, 97-98, 99, 137-139, 143-144, 146, 149, 153-154, 163) defendant was permitted to examine him concerning the method of operation of Waipahu Auto Exchange, Limited. This, we submit, is in clear violation of the rule in the federal courts and was error. But, of course, every error is not reversible error. In *Wills v. Russell,* 100 U.S. 621 (1880), the Supreme Court noted that it was never error for the trial judge to enforce the rule limiting cross-examination, but held that the relaxation of the rule will not be reversible error unless the party is injured thereby. As stated in *Union Electric Light & Power Co. v. Snyder Estate Co.,* 65 F. (2d) 297 (C.C.A.-8), at 302:

> "It is the rule of this court that a party who calls a witness may restrict his cross-examination to the subjects of his direct examination, and a violation of this right, if prejudicial, is reversible error. If the cross-examiner wishes to inquire of the witness concerning matters not touched upon in the direct examination, he must make the witness his own."

In that case the court determined that it was prejudicial to permit defendant to cross-examine as to matters not touched upon in the direct.

In determining whether, in the instant case, there was prejudicial error, in permitting the extensive cross-examination, we are assuming that which we do not believe the evidence to show, namely, that the testimony of Yokono would establish implied or apparent authority in Anthony Yee, as president, to endorse and cash checks payable to Waipahu Auto Exchange, Limited. Having so assumed, we submit, that it was clearly prejudicial to permit the cross-examination conducted by counsel for defendant.

One of the reasons given in support of the federal rule limiting cross-examination to the scope of the direct ex-

amination is that the party calling a witness stands as a sponsor for the truth of his witness's testimony and is to a certain extent bound thereby. *Harrold v. Territory of Oklahoma,* 169 Fed. 47 (C.C.A.-8) ; *Ferry-Hallock Co. v. Orange Hat Box Co.,* 185 Fed. 816 (C.C.N.J.). Witness Yokono, insofar as this plaintiff is concerned, was called only to identify and authenticate a document. Plaintiff did not intend nor desire to stand as "sponsor for the truth" or to be bound by any testimony that he might be able to give in connection with defendant's affirmative defense of payment. If defendant believes that witness Yokono can assist in the establishment of this defense, let it call him as a witness, stand sponsor for his veracity, and be bound by his testimony. By the practice permitted in the district court, the positions of the parties have been reversed.

Another way in which the parties have been reversed in their proper positions to plaintiff's prejudice is with respect to the right of cross-examination.

For good cause, although none appears in this case, admittedly the trial court may permit the hearing of testimony out of order and so permit the defendant, while a witness for the plaintiff is on the stand, to examine him as a witness of the defendant. But such was not the practice in this case. The court specifically stated that Yokono was not being examined as a witness for the defendant (R. 152), and specifically ruled that Yokono, although called for a limited special purpose, nevertheless could be questioned on cross-examination beyond that scope (R. 144).

That this was prejudicial to plaintiff's case we believe is patent. By this tactic defendant obtained the advantage of making witness Yokono his own for the purpose of presenting evidence material to its affirmative defense while precluding cross-examination by plaintiff by the use of leading questions. Defendant obtained thereby the advantage of eliciting testimony from this witness through leading and suggestive questions while, under the ruling of the court,

plaintiff was limited to direct questioning. For all the foregoing reasons, appellant submits that the trial court erred in having allowed the cross-examination to wander so far afield. If, contrary to appellant's argument in III and IV supra, this Court should find that evidence adduced during said cross-examination supports the trial court's conclusion of applied or apparent authority, then appellant submits that the trial court's error was obviously prejudicial and therefore reversible error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be vacated and set aside and a new trial ordered.

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APPENDIX I

(Hawaiian C.C. 1859, s. 1431, as amended—
now sec. 8335, Revised Laws of Hawaii 1945)

"Sec. 8335. By-Laws; corporation procedure. The by-laws of a corporation may be adopted, amended or repealed by the vote of the holders of not less than a majority of all of the shares of stock outstanding, or if two or more classes of stock have been issued, of a majority of each class of stock outstanding and entitled to vote, or in case of a non-stock corporation, the majority of its members present at any meeting duly called and held, the notice of which shall have stated that a purpose of the meeting is to consider the adoption, amendment or repeal of the by-laws; provided, however, that by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association; provided, further, that the articles of association or charter or by-laws of any corporation may require the authorization or approval of a larger proportion of the stockholders or members, or of any class or classes thereof for the adoption, amendment or repeal of by-laws of the corporation, and also may impose any other restrictions on the adoption, amendment or repeal of by-laws and, in any such case, such provisions of the articles of association or charter or by-laws shall be complied with in order to effect any such adoption, amendment or repeal.

Every corporation shall keep in its principal office for the transaction of its business in the Territory the original or a copy of the by-laws as amended or otherwise altered to date, certified by the secretary or other proper officer, which shall be open to inspection by the stockholders or members at all reasonable times during office hours.

No person dealing with the corporation shall be charged with constructive notice of the by-laws."